STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal of Comfort Adult Day Care Center Regarding a Denial of License Application FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

This matter came before Administrative Law Judge Eric L. Lipman upon an appeal by the Applicant from a denial of its application for a license to operate an Adult Day Care Center.

Andrew J. Dawkins, Attorney at Law, appeared on behalf of the Applicant, Comfort Adult Day Care Center (Comfort). Anthony R. Noss, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (the Department).

An evidentiary hearing was held at the Saint Paul offices of the Office of Administrative Hearings on June 6, 2012. The hearing record closed following the adjournment of the hearing.

STATEMENT OF THE ISSUES

- 1. Was Pamela L. Miller a "controlling individual" of Global Early Childhood Learning Center, as those terms are used in Minn. Stat. 245A.04, subd. 5a?
- 2. Was the Department's denial of Comfort Adult Day Care Center's application for an adult day care center license lawful and appropriate?

The Administrative Law Judge concludes that Ms. Miller was not a "controlling individual" of Global Early Childhood Learning Center, as those terms are used in Minn. Stat. § 245A.04, subd. 5a. For that reason, the Administrative Law Judge further concludes that it is inappropriate to disqualify Comfort Adult Day Care Center's application from further review because Ms. Miller is a "controlling individual" of that entity.

Based upon the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

- 1. Ayub Ali is a 24-year old Somali immigrant to Minnesota who is attending St. Cloud State University. Mr. Ali's coursework includes studies in political science and business administration.¹
 - 2. Mustafa Abukar is a family member and business associate of Ayub Ali.²
- 3. In 2010 and 2011, Ayub Ali and Mustafa Abukar sought to obtain licensure for facilities to provide adult day care services and child care services.³
- 4. In 2010, Ayub Ali and Mustafa Abukar submitted application materials on behalf of their corporation, Soos Senior Service Center, Incorporated (Soos Center), seeking a license to operate an adult day care center program. This application listed 2615 Pillsbury Avenue, South, Minneapolis, Minnesota, as the proposed site for the program.⁴
- 5. The application submitted on behalf of the Soos Center was inadequate in several material respects.⁵
- 6. On October 22, 2010, Ayub Ali and Mustafa Abukar submitted application materials on behalf of a different corporation, Global Early Childhood Learning Center, Incorporated (Global), seeking a license to operate a child day care center program.⁶
- 7. The application submitted on behalf of Global was also inadequate in several material respects. It lacked a number of the required plans and procedures.⁷
- 8. The Department will permit persons and entities that are otherwise eligible for licensure an opportunity to supplement incomplete applications before denying the application.⁸
- 9. On January 5, 2011, the Department sent a Notice of Incomplete Application to Mustafa Abukar, a controlling individual and the designated director of Global's program. The letter informed Mr. Abukar that the license application submitted

¹ Exhibit 1 at 6; Testimony of Ayub Ali.

² Test. of Ayub Ali.

³ *Id*.

⁴ Ex.4 at 34.

⁵ Testimony of Bridget Landry; Testimony of Peggy Cunningham; Testimony of Keith Henderson.

⁶ Ex. 12.

⁷ Ex. 13.

⁸ Ex. 13; Test. of K. Henderson; Test. of P. Cunningham; Testimony of Jim Abeler.

on behalf of Global was incomplete and that additional information needed to be submitted to continue the license application process.⁹

- 10. Following receipt of the January 5 letter, attorneys for Global sought out Department officials in an effort to identify shortcomings in the Global application and to remedy those defects before the Department formally denied Global's application. Global's business and legal team understood that a denial of its application could have significant consequences for the Ali family's business plans and investments.¹⁰
- 11. On January 31, 2011, Ayub Ali, indicated, by way of facsimile letter, that Global was changing its business and program address to 2617-2619 Bloomington Avenue South, Minneapolis, Minnesota. In that letter, Mr. Ali requested that the application be revised to reflect that change.¹¹
- 12. In March of 2011, Ayub Ali posted an advertisement to the online service "Craig's List" in search of a health care professional who would assist Global in the licensing process for its facility.¹²
- 13. Pamela L. Miller is a registered nurse. While Ms. Miller was employed in March of 2011 at a medical device firm, she did not work in either a supervisory or clinical setting as a nurse.¹³
- 14. In March of 2011, Ms. Miller answered the advertisement posted by Ayub Ali on Craig's List. During a short meeting between the two, Mr. Ali detailed his interest in starting a day care business and Ms. Miller described her credentials and experience to manage such a business.¹⁴
- 15. In April of 2001, Ms. Miller began researching the requirements for licensure of a day care center and began drafting the policies and procedural materials that Global would need in order to submit an appropriate application for licensure. Ms. Miller undertook this work with the understanding that Ayub Ali would appoint her as the Program Director for the child care center if Global obtained licensure. ¹⁵
- 16. Without Ms. Miller's knowledge, on April 11, 2011, Ayub Ali collected and submitted to the Department some of the materials that Ms. Miller had drafted. While

⁹ Ex. 13.

¹⁰ Test. of B. Landry; Test. of Ayub Ali; see also, Ex. 10.

¹¹ Ex. 14 at 172.

¹² Test. of P. Miller; Test of Ayub Ali.

¹³ Ex. 1 at 5 and 11.

¹⁴ Test. of P. Miller; Test of Ayub Ali.

¹⁵ Test, of P. Miller.

these items were in still draft form, he believed that they would demonstrate the progress that Global was making in developing a revised application for licensure.¹⁶

- 17. While the April 11 submissions included "some of the required policies and procedures, forms and documents" that are needed for licensure, those submissions were not adequate in several material respects.¹⁷
- 18. On May 6, 2011, Ayub Ali and Pamela Miller signed an employment contract that memorialized their earlier arrangement: Ms. Miller would be retained by Global as the Program Director for its facility if Global secured licensure as a child care center.¹⁸
- 19. On June 3, 2011, the Department issued an Order of License Denial to the Soos Center.¹⁹
- 20. In the Department's records, Ayub Ali and Mustafa Abukar were identified as "controlling individuals" under Minn. Stat. § 245A.04, subd. 5a for two entities, the Soos Center and Global.²⁰
- 21. Following the Order of License Denial for the Soos Center, the Ali family sought to preserve the investments that they had made towards a child care facility and an adult day care facility. Realizing that the license denial for the Soos Center meant a two-year bar on re-application by any of the controlling individuals of the Soos Center, the Ali family sought to transfer the property held by Global to those who were not barred from making a subsequent license application.²¹
- 22. Abdiweli Ali is Ayub Ali's younger brother. Abdiweli Ali has undertaken course work at St. Paul College, where his studies included business administration and early childhood development.²²
- 23. In June of 2011, Abdiweli Ali undertook a purchase of the Global assets from his brother. Likewise, Abdiweli Ali carried forward the arrangement that his brother had with Ms. Miller namely, Ms. Miller would be retained by a new corporate entity as Program Director for its facility, if the new entity secured licensure as an adult day care center.²³

¹⁶ Test of Ayub Ali.

¹⁷ Ex. 9 at 142 - 44.

¹⁸ Ex. 1 at 2; Test. of P. Miller.

¹⁹ Ex. 9 at 145.

²⁰ Ex. 5 at 37; Ex. 9 at 147.

²¹ Ex. 10; Test. of Ayub Ali.

²² Ex. 1 at 5 and 14.

²³ Ex. 1 at 14 - 16.

- 24. With this new arrangement, Ms. Miller began working on different application materials for Abdiweli Ali's enterprise, Comfort Adult Day Care Center.²⁴
- 25. By way of an electronic mail message from Global's attorney, Bridget Landry, to Peggy L. Cunningham, a Supervisor in the Department's licensing unit, dated June 28, 2011, Global signified its intent to withdraw its application for a child care license. Global's attorney inquired of Ms. Cunningham if there were any additional steps that Global needed to undertake in order to "make this withdrawal effective." ²⁵
- 26. On July 15, 2011, Ms. Miller submitted materials on behalf of Comfort Adult Day Care Center, in support of an application for an adult day care center program.²⁶
- 27. Because the state government offices were shut down during the first three weeks of July, and the non-essential employees of state government were on involuntarily leave during this period, the Comfort application was marked as received on July 15 but not otherwise processed.²⁷
- 28. In July of 2011, someone with access to Ms. Miller's working papers submitted additional materials to the Department relating to Global.²⁸
- 29. Following his return to service after the shutdown, Department licensing evaluator Keith Henderson telephoned Ms. Miller and requested additional information about the Global-related submission. It was not clear to him, and remains unclear today, why these working papers and copies of employment applications were hand-delivered to the Department. When Henderson reached Miller by telephone, Ms. Miller did recognize the materials that Henderson verbally described to her, but Miller did not acknowledge sending the items to the Department or offer an explanation as to how the items arrived at the Department. Instead, Miller told Henderson that she would telephone him again. Within a few minutes, Ms. Miller telephoned Mr. Henderson and told him that the Global application for a child care center had been "withdrawn." 29
- 30. On August 25, 2011, the Department issued a Notice denying the application of Global Early Childhood Learning Center, Inc., for a child care program license. This notice identified Ms. Miller as a controlling individual in Global.³⁰

²⁴ Test. of P. Miller.

²⁵ Ex. 10 at 152.

²⁶ Ex. 3.

²⁷ Ex. 3 at 25.

²⁸ Ex. I.

²⁹ Ex. 6; Ex. I; Test. of K. Henderson.

³⁰ Ex. 9.

- On September 23, 2011, the Department issued a Notice denying the application of Comfort for an adult day care center program license. This notice identified Ms. Miller as a controlling individual in Global and asserted that, under Minn. Stat. § 245A.04, subd. 7, this association precluded a re-application by Miller for a period of two years. The only basis for denying Comfort's application detailed in the Notice was the two-year bar under Minn. Stat. § 245A.04, subd. 7.31
- 32. Comfort timely appealed the Department's denial of its application for an adult day care center program license.³²

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

- 1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 14.50 and 245A.05.
- 2. The Department of Human Services gave proper and timely notice of the hearing in this matter.
- 3. Minn. Stat. § 245A.04, subd. 7 (e) prohibits the Commissioner of Human Services from issuing a license to operate a child care or adult care program if a controlling individual of the would-be license holder "has been denied a license within the past two years."33
 - 4. In Minn. Stat. § 245A.02, subd. 5a, a "controlling individual" is defined as:
 - a public body, governmental agency, business entity, officer, owner, or managerial official whose responsibilities include the direction of the management or policies of a program.... For purposes of this subdivision, managerial official means those individuals who have the decision-making authority related to the operation of the program, and the responsibility for the ongoing management of or direction of the policies, services, or employees of the program.
- Ayub Ali credibly testified that he submitted working papers that were drafted by Ms. Miller to the Department and that he submitted those materials at a time when the items were incomplete.
- Both Ayub Ali and Pamela Miller testified credibly that Ms. Miller was unaware that Ali had submitted draft application materials to the Department.

³² Ex. 1 at 1.

³¹ Ex. 2; see also, Ex. 6.

³³ Minn. Stat. §§ 245A.03 and 245A.04 1 (a) and 7 (e) (3).

7. Under Minn. R. 1400.7300, subp. 5, the Department bears the burden to establish by a preponderance of the evidence that the disqualification of Pamela Miller was consistent with Minn. Stat. § 245A.02 and 245A.04.

8. The Department did not establish that with respect to the Global Early Childhood Learning Center, Pamela Miller directed Global's management or policies, had decision-making authority relating to Global's operations, or had ongoing management of the policies, services or employees of the program.

9. Comfort established that with respect to the Global Early Childhood Learning Center, Pamela Miller did not direct Global's management or policies, have decision-making authority relating to Global's operations, or have ongoing management of the policies, services or employees of the program.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that:

1. The Department's Notice of Denial, relating to Application Number 1060984 be **VACATED**; and,

2. The Commissioner direct that the Department's records as to Application Number 1059089 be **MODIFIED** so as to delete the listing of Pamela Miller as a controlling individual.

Dated: July 16, 2012

_s/Eric L. Lipman ERIC L. LIPMAN Administrative Law Judge

Reported: Digitally recorded.

NOTICE

This report is a recommendation, <u>not</u> a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

While this case involves a complex web of corporate and familial relationships, as a matter of law, it devolves to a single question: Did Pamela Miller exercise sufficient authority within Global to be a "controlling individual" of that company?

While the Department was certainly reasonable in its belief that Ms. Miller had a substantial role in directing Global's business affairs – because the papers that it received made that claim explicitly – the hearing record does not bear out this belief. The uncontroverted testimony at the evidentiary hearing was that Ms. Miller's employment, pay and supervisory authority with Global were all contingent upon a future event: Global's receipt of a license to operate a child care program. Until the license was obtained, Ms. Miller was a mere draftsman, hoping for a future managerial position in her field.

Likewise important, Ms. Miller was not aware that her preliminary drafts were being routed to the Department by Ayub Ali.

In the view of the Administrative Law Judge, Ms. Miller's work on a revised license application for Global falls far short of the duties and responsibilities of a "controlling individual" of a corporation, as those terms are used in Minn. Stat. §

245A.02, subd. 5a. The terms "controlling individual" suggest both the purposeful direction of policy and the authority to do so. Neither was the case with Ms. Miller.

It bears mentioning that these facts were not known to Department officials before the filing of the contested case. Given the number and breadth of the application materials received by the Department each year, it is extremely unlikely that licensing officials would have known the true nature of the employment arrangement between Global and Miller. Further, the fact that Ayub Ali acted alone, submitting incomplete drafts that he thought would be helpful to Global's bid for licensure, could not have been appreciated either by Ms. Miller or Department officials before the decision to deny Comfort's application. From the view of the Licensing Division of the Department, the circumstances surrounding the Comfort and Global applications were anything but clear.

For these reasons, the issues presented in this contested case are limited. To say that Ms. Miller and Comfort should not be summarily barred from submitting application materials is not to say that Comfort has firmly established its entitlement to the issuance of an adult day care program license. These are two very different matters. The hearing record includes details as to why Department officials might be concerned about the completeness of Comfort's application and its ability to serve clients if Ms. Miller were ever to become ill or leave the corporation.³⁴

For the purposes of this case, however, Comfort and Ms. Miller should have the opportunity to address those concerns in an additional set of submissions.

E. L. L.

³⁴ Ex. 1 at 5 and 11; Ex. 8; Test. of K. Henderson; P. Cunningham.